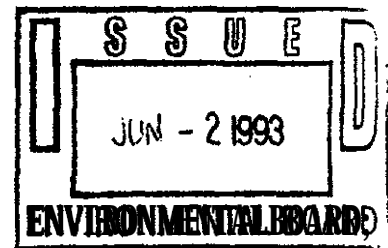


VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



Re: Northern Ski Works, Inc. and Lori Budney
Declaratory Ruling Request #281

MEMORANDUM OF DECISION

This decision pertains to a petition for declaratory ruling concerning the applicability of 10 V.S.A. Chapter 151 (Act 250) to a ski shop operated by Northern Ski Works, Inc. on a tract of land owned by Lori Budney (collectively, the Petitioners) and located in Ludlow. As is explained below, the Environmental Board grants a request by Steven Rolka for party status and sets the matter for hearing.

BACKGROUND

On September 22, 1992, Assistant District #2 Coordinator Julia Schmitz issued Advisory Opinion #2-77, finding that an Act 250 permit was not required for the ski shop. The advisory opinion includes seven numbered facts. The opinion states that the relevant tract originally included approximately 1.5 acres, that the tract was divided into two parcels consisting of approximately .99 and .5 acres respectively, and 'that the ski shop was being built on the .99 acre tract. The opinion concludes that petitioner Budney, purchaser of the .99 acre parcel and lessor of the parcel to the corporate petitioner, controlled the subdivision of the tract. The opinion also concludes that Act 250 does not apply because Ms. Budney does not now control the smaller parcel.

Mr. Rolka, who had requested the Assistant Coordinator's opinion, appealed to the executive officer. On November 19, 1992, Associate General Counsel Aaron Adler issued Advisory Opinion #EO-92-271, concluding that an Act 250 permit was and is required.

On December 21, 1992, the Petitioners filed a request for reconsideration or, alternatively, petition for declaratory ruling. By letter of December 22, the Associate General Counsel informed the Petitioner that he declined to reconsider and that the matter would be treated as a declaratory ruling request.

On February 16, 1993, the Board issued a notice of declaratory ruling petition. The notice required that all interested parties file statements: (a) setting out their interest and stake in this matter, (b) identifying all issues they deem relevant, and (c) setting out which, if any, of the numbered facts in the Assistant Coordinator's opinion are disputed. The notice also gave the opportunity for parties who oppose the participation of another party to file an opposition, stating that the Board will determine any party status dispute in deliberative session.

(D.R.#281M)

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On March 15, 1993, the Petitioners filed a statement in response to the February 16 notice. On March 19, Mr. Rolka did the same. On April 14, the Petitioners filed an objection to the participation of Mr. Rolka. The Board deliberated on May 6 in Montpelier.

DECISION

Based on Rules 3(C) and 14, the Board has previously stated that parties to a declaratory ruling proceeding are those who qualify for party status under Rule 14 or are otherwise interested parties under Rule 3(C) because they have an identifiable stake in the matter. Re: Interstate Uniform Service, Inc., Declaratory Ruling #147 at 3 (Sep. 26, 1984).

The Board grants Mr. Rolka's request pursuant to Rule 14(B)(1)(a) because he owns and resides on property which he represents is located approximately a quarter mile away from the ski shop on the same street as the shop and because he may be affected under Criteria 5 (traffic) and 8 (aesthetics) of 10 V.S.A. § 6086(a).

The Board notes that the Petitioners not only object to Mr. Rolka's participation but also to the issues identified by him as relevant to this matter. In summary, those issues are:

1. Whether the subdivision at issue was for the sole purpose of evading Act 250;
2. Whether the subdivision was done solely at Ms. Budney's insistence, at her expense, and for her benefit;
3. Whether construction commenced on the ski shop at a time when the entire 1.5 acre parcel was under control of the Petitioners;
4. Whether ski shop construction continued following issuance of Advisory Opinion #EO-92-271; and
5. Whether lands presently owned by a third party, Yorfino, "form a functional part of the .5 acre parcel subdivided and sold to Lori Budney."

The overall question in this matter is whether the ski shop constitutes development for which an Act 250 permit was and is required. Relevant legal provisions include 10 V.S.A. §§ 6001(3) and 6081(a) and Board Rules 2(A)(2) and

2(F). In connection with this issue, the main point of contention appears to be whether ~~the amount~~ of involved land should be considered to be 1.5 acres because of the alleged control over the tract exercised by Ms. Budney. See In re Vitale, 151 Vt. 580, 584-85 (1989); In re Eastland, 151 Vt. 497, 499-502 (1989).

With respect to Mr. Rolka's issues, the Board believes that his issue one appears relevant because the absence of any other purpose for the division of the tract may tend to show control. Issue two appears relevant because proof of who sought, paid for, and benefitted from the division may also tend to show control. Issue three appears relevant on its face.'

Issue four does not appear relevant. An advisory opinion does constitute notice of the permit requirement and continued construction following receipt of such notice is grounds for seeking higher penalties in an enforcement proceeding. 10 V.S.A. §§ 8010(b)(3), 8221(b)(6); Re: Esprit, Inc., Declaratory Ruling #181 at 3 (July 3, 1987). However, the question of penalties for violation of Act 250 is not at issue; rather, the issue is the applicability of the Act. 10 V.S.A. § 6007(c); 3 V.S.A. § 808.

The Board cannot determine the relevance of issue five because it does not understand the issue since the facts appear to be that the .5 acre parcel was not sold to Ms. Budney. The Board therefore will direct that Mr. Rolka clarify the issue prior to hearing.

Based on the statements filed by the parties, the Board understands that, of the numbered facts listed in the Assistant Coordinator's advisory opinion, one through five are not disputed, and that parties seeks to offer additional relevant evidence. Accordingly, the Board will deem facts one through five stipulated and will set the matter for evidentiary hearing.

'The Board's determination that an issue is relevant is merely that - a determination of relevance. It is not a determination that an issue is dispositive or that an allegation is true.

ORDER

1. Mr. Rolka is granted party status pursuant to Rule 14(B)(1)(a).

2. The Petitioners' objection to Mr. Rolka's issue four, as listed and described above, is granted. The Petitioners' objection Mr. Rolka's issues one through three, as listed and described above, is denied.

3. Mr. Rolka will clarify issue five, as listed and described above, in writing no later than the date set in this order for filing initial prefiled testimony, or that issue will be deemed irrelevant.

4. On or before June 23, 1993, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.

5. On or before July 8, 1993, parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.

6. On or before noon on July 16, 1993, parties shall file in writing all objections to the prefiled testimony and exhibits previously identified, or such objections shall be deemed waived. The term "objections" means objections based on the Vermont Rules of Evidence.

7. An administrative hearing panel of the Environmental Board will convene a hearing in this matter on July 21, 1993, to be confirmed by subsequent notice with location. Any objection to the use of the hearing panel must be filed on or before June 11, 1993, or the objection will be deemed waived.

8. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are attached.

9. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

10. Parties shall file an original and ten copies of prefiled testimony, legal memoranda, all exhibits which are 8 1/2 by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the

attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than 8 1/2 by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

11. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter as follows: P for the Petitioners and R for Mr. Rolka. Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, the Petitioners will number their exhibits P1, P2, P3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. P2A, P2B, etc. However, parties do not need label each page of a multi-page exhibit. The labels on the exhibits must contain the words ENVIRONMENTAL BOARD, D.R. Request #281, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. A dozen label stickers are enclosed with the copies of this order going to the Petitioners and Mr. Rolka; more are available on request.

Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Board's case number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony. An example is as follows:

TOWN OF LUDLOW
LIST OF EXHIBITS
RE: NORTHERN SKI WORKS, D.R. #281

<u>Number</u>	<u>Description</u>	<u>Status</u>
L1	Prefiled testimony of John Smith	
L2A-D	Plan dated _____, sheets A1 through A4	

The Board will use the status column to mark whether the exhibit has been admitted.

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12. The hearings will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by June 23, 1993. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

Dated at Montpelier, Vermont this 2nd day of June, 1993.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair
Ferdinand Bongartz
Samuel Lloyd
William Martinez
Jean Richardson
Steve E. Wright

Members dissenting:

Terry Ehrich*
Lixi Fortna*
Arthur Gibb*

*Members Ehrich, Fortna, and Gibb dissent from the majority's grant of party status to Mr. Rolka. They otherwise concur.

attachments

northern.mem(awp12)